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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 434

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation, and
WESTINGHOUSE ELECTRIC CORPORATION,
Petitioners,

v.

THEODORE BRITTON,
Deputy Commissioner,
United States Employees' Compensation Commission,
and
WALTER W. HARDY,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 18, 1956

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IN THE

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No.

LIBERTY MUTUAL INSURANCE COMPANY,
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v.

THEODORE BRITTON,
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United States Employees' Compensation Commission,
and
WALTER W. HARDY,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Liberty Mutual Insurance Company and Westinghouse Electric Corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on May 10, 1956.

OPINIONS BELOW

The District Court wrote no opinion. Its order granting defendant's motion for summary judgment (R. 9) is not reported. The opinion of the United States Court of Appeals for the District of Columbia circuit (R. 43-48) is not yet reported. It is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1956 (R. 49). A petition for rehearing en banc was filed on May 25, 1956 (R. 50-58) and was denied per curiam June 20, 1956 (R. 59). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254, Subsection (1).

QUESTIONS PRESENTED

Permanent partial disability benefits are to be paid at 66⅔ per cent of the difference between the pre-injury average weekly wage and the post-injury wage-earning capacity. Undisputed facts demonstrate that claimant had been continuously employed in regular long term employment for two years prior to the industrial accident complained of. In such circumstances, Section 910(a) of the Act provides that the average weekly wage shall be a multiple of the daily wage earned. ". . . in the employment in which he was working at the time of the injury . . .". The Deputy Commissioner refused to apply Section 910(a) and acting purportedly on the authority of Section 910 (c) included wages earned in unrelated part time employment in computing average weekly wage. He thereby provided for the award a basis which otherwise did not exist.

1. Are Sections 910(a) and 910(c) required to be alternatively and exclusively applied in determining average weekly wage.

2. May the Deputy Commissioner apply Section 910(c) without the benefit of evidentiary support for a finding that Section 910(a) cannot be applied "reasonably and fairly".

3. May the Deputy Commissioner consider part time wages received in dissimilar employment when computing the average weekly wage of one engaged full time in regular and continuous employment.

4. May the Deputy Commissioner award permanent partial disability benefits for impaired wage earning capacity when claimant's post injury earnings exceed his pre-injury earnings and there is no evidence that earnings received do not realistically represent his ability to earn.

5. Do subjective complaints of pain and discomfort provide the basis for an award of permanent partial disability benefits for impaired wage earning capacity.

STATUTE INVOLVED

The statutory provisions involved are Sections 902, 908 and 910 of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. A. 901, et seq., as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D. C. Code 36-501, et seq. The pertinent provisions are reproduced herein as Appendix C.

STATEMENT

The complaint (R. 1) filed by petitioners in the United States District Court for the District of Columbia sought a mandatory injunction to restrain the enforcement of an award to Walter W. Hardy of

permanent partial disability benefits for impairment of wage earning capacity which was purportedly sanctioned by the Workmen's Compensation Statute for the District of Columbia.

Claim:

Mr. Hardy, on July 21, 1952, had been employed by Westinghouse Electric Corporation for two years (R. 12) as a construction mechanic's helper. This was an unskilled laboring position for which he was paid an average weekly wage of $84.40 (R. 12, 15, 26, 30). The fall, which he sustained on that date (R. 10) resulted in back injuries for which he was paid, without objection, temporary total disability benefits at the maximum rate (R. 11) until his return to full time employment on January 29, 1953 (R. 16-17). Upon his return, he became a maintenance mechanic's helper which is a semi-skilled position requiring less physical exertion and more knowledge of the electrical side of the elevator business (R. 16-17, 30-31). Thereafter, an additional claim for permanent partial disability benefits for allegedly impaired earning capacity was filed on October 22, 1953 (R. 11).

Statutory Formula as Applied to the Evidence:

Section 908(c)(21) provides that benefits ". . . shall be 66⅔ per centum of the difference between his average weekly wages and his wage earning capacity thereafter . . ."

Section 910 dictates that ". . . the average weekly wage . . . shall be taken as the basis upon which to compute compensation and shall be determined . . ." by reference to its subdivisions. Subdivision (a) provides that "If the injured employee shall have worked

in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceeding his injury, his average annual earnings shall consist of . . . 260 times the average daily wage or salary for a five-day worker which he shall have earned in such employment . . ." Walter Hardy worked regularly for Westinghouse for two years immediately preceeding his injury. His average weekly wage in that employment was $84.40 (R. 15-16).

Section 908(h) requires that wage earning capacity ". . . shall be determined by his actual earnings . . ." if any, unless there is evidence that ". . . his actual earnings do not fairly and reasonably represent his wage earning capacity . . ." Mr. Hardy's actual post injury earnings were $94.60 (R. 20). There was no contention or suggestion that this wage was not actually "earned".

The post injury position required less physical exertion than did the pre-injury assignment however, it was a standard position in the Westinghouse organization, and claimant did the same work in the same way and for the same considerations and compensation as any other maintenance mechanic's helper (R. 37-38). The evidence demonstrated without contradiction that the maintenance end of the business was more stable than the construction and that there was equal chance for advancement so that long range employment prospects were not adversely affected by the change of departments (R. 36-38). Mr. Harris was well qualified to be a maintenance mechanic's helper (R. 27, 36-37) and by his own admission was physically able to perform that work without limitation (R. 27). He was shown no favoritism and there was no complaint about

his work (R. 26-38). His earnings increased because of general wage increases which was negotiated by the union (R. 20-21). There was no relevant evidence[1] that the earnings actually received were not reliable or fairly representative of claimant's ability to earn. Indeed, the Deputy Commissioner found the post injury wage earning capacity to be $91.26 (R. 6) which is more than the pre-injury average weekly wage computed by reference to Section 910(a).

In order to provide the basis for an award, the Deputy Commissioner seized upon the provisions of Section 910(c) which is designed for use: "If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied. . ." Necessarily implicit in the action of the Deputy Commissioner is the finding that Sections 910(a) and (b) could not be reasonably applied. Such a finding would be completely without evidentiary support in the record.

The clear and unambiguous terms of the Act, its legislative history and the applicable authorities restrict the use of Section 910(c) to cases where the nature of the employment is seasonal, intermittent or discontinuous. It was invoked in this case by the Deputy Commissioner because he wanted to add to Mr. Hardy's $84.40 weekly wage at Westinghouse, the

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[1] Claimant testified with respect to subjective complaints of pain and discomfort (R. 16-21) and he was given a ten percent medical disability rating by the physician (R. 33). The medical expert was unwilling to voice an opinion that this medical disability had any effect upon work incapacity and stated that whether there would be any interference with heavy physical lifting would be speculative (R. 34-35). Mr. Hardy admitted his pre-injury strength had returned (R. 28) and stated that he was physically able to perform his post-injury tasks without limitation (R. 27).

$17.00 which he earned at the Giant Food Store in dissimilar part time employment so that there would be a difference to which the mathematical formula of Section 908(c)(21) could be applied. The Act does not permit the inclusion of wages earned in unrelated employments in determining the average weekly wage of one engaged in regular long term employment. Section 910(a).

The Court of Appeals reasoned that the consideration of part time wages in unrelated industry was sanctioned by Section 910(c) and affirmed without rationally considering petitioners' contention that the use of Section 910(c) in the circumstances presented in this cause was forbidden by the Act.

REASONS FOR GRANTING THE WRIT

In support of their petition for writ of certiorari, petitioners state: that the decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d 979 (4th Cir. 1949); that the decision of the Court of Appeals is contrary to the express terms of the statute and to the stated intention of Congress; that the decision of the Court of Appeals is disruptive to the statutory scheme of compensation and detrimental to the proper administration of the Act.

1. The decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit.

Benefits for permanent partial disability are warranted when it is shown that impairment of wage earning capacity has resulted from injury sustained in the course of employment. Physical damage or injury for

which one might recover in a tort action is not a sufficient basis for an award unless it has demonstrable effect upon the ability to earn wages. *Iacone* v. *Cardillo,* 208 F.2d 696 (2d Cir. 1953); *Ziegale's case,* 225 Mass. 128, 89 N.E.2d 264 (1949); *Standard Surety Co.* v. *Sloan,* 180 Tenn. 220, 173 S.W.2d 436 (1943); *American Mutual Liability Ins. Co.* v. *Hampton,* 33 Ga. App. 476, 127 S.E. 155 (1925). In *Pillsbury* v. *United Engineering Co.,* 342 U. S. 197, 201 (1952) Justice Burton dissenting said:

> "That the Act is concerned solely with compensation for disability . . . appears on its face. Compensation is not payable to an employee merely because he has been in an accident in the course of his employment, nor even because he has suffered physical damage from the accident. The act allows compensation only when the employee also has suffered a resulting loss of earning power."

The instant cause presents for review an award which is based solely upon testimony of subjective complaints and medical disability. The award is made despite the undisputed fact that claimant has sustained no actual loss of earnings in the subject employment as the result of injuries received.

Walter Hardy worked for two years next preceeding his injury in regular long term employment for Westinghouse. The determination of his average weekly wage for the purpose of making the computation required by Section 908(c)(21) is controlled by Section 910(a) which provides that:

> "If the injured employee shall have worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceeding his in-

> jury, his average annual earnings shall consist of . . . 260 times the average daily wage . . . earned in such employment. . ."

By that provision, which relates to continuous and regular long term employment, consideration is restricted to earnings . . . "in the employment in which he was working at the time of the injury. . ."

The Deputy Commissioner refused to accept that principle in this cause, and in an effort to escape it applied Section 910(c) without warrant in the evidence. This unjustified application was used as the vehicles to include the part time wages earned in the dissimilar employment at Giant Food Stores so that the Deputy Commissioner could "find" that the pre-injury average weekly wages of Mr. Hardy was $101.40 instead of the $84.40 and thereby provide the basis for the computation required by Section 908(c)(21).

In *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d. 979 (4th Cir. 1949) the Deputy Commissioner appealed to the Court of Appeals when the trial court ruled that Section 910(c) should be applied instead of 910(b) even though there was no evidence that the employment of the steam fitter claimant was by its nature intermittent or casual. Judge Parker, speaking for the Court reviewed the language, purposes and intent of the Act, and ruled: (1) that subsections (a), (b), and (c) were to be exclusively and alternatively applied; (2) that subsections (a) and (b) are to be applied when employment is of a continuous nature and that subsection (c) is to be applied only when the employment is intermittent or discontinuous in its nature; (3) that compensation is to be based upon the employee's earning capacity in the employment in which he is engaged at the time of injury if that employment is of

a permanent and steady character; (4) that other earnings are not to be considered when one is injured in regular, continuous employment; (5) that subsection (c) is inapplicable in the absence of evidence that subsections (a) and (b) can not reasonably and fairly be applied. The Court in reversing the judgment stated at pages 981-982:

> "The reasoning underlying the act is that compensation is to be based upon the employee's earning capacity in the employment in which he is engaged at the time of injury. If he has worked in that employment for a year preceeding the injury, his own earnings furnish the basis of compensation under subsection (a). If he has worked in the employment less than a year, compensation is computed under subsection (b) and is based on the average earnings over the preceding year of an employee of the same class working in such employment. Where neither (a) nor (b) can reasonably or fairly be applied because of the nature of the employment, as where it is intermittent or discontinuous in nature, then the compensation is to be determined under (c) on the basis of the annual earning capacity of the employee."
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> * * *
>
> "The reason that the actual earnings of the employee are taken into account under (c) but not under (a) or (b) is obvious upon reflection. Compensation is based upon the earning capacity which is impaired or destroyed by the injury; and where the injury occurs in employment of a permanent and steady character, compensation based upon the earnings of that employment fairly compensate for the loss of earning capacity that has been sustained."

The Deputy Commissioner prevailed in the Fourth Circuit apparently making the same argument that he resists herein. The factual similarity is clear. The

fact that the same statute is involved is demonstrated by comparison of the provision here involved with the footnote on page 891 of the *O'Hearne* opinion. The conflict is diametric and should be resolved. The chameleon-like advocacy of the Department of Labor has injected complete confusion into the administration of permanent partial disability claims now that the Court of Appeals for the District of Columbia has seen fit to sanction the application of subsection (c) in this action.

Other reported cases support the principles advanced in *O'Hearne* v. *Maryland Casualty Co. supra. Marshall* v. *Mahoney Co.*, 46 F.2d 539 (D. C. W. D. Wash. 1931), affd 56 F.2d 74 (9th Cir. 1932; *Luckenback S. S. Co.* v. *Marshall*, 49 F.2d 625 (D. C. D. Ore. 1931).

The importance of restricting the employee engaged in steady and continuous employment to compensation based upon wages earned in that employment cannot be overestimated. Workmen's Compensation legislation is feasible because standards have been enacted which permit industries to spread the losses thereby incurred over the industry as a legitimate cost of doing business. Experience provides a basis for systematic and actuarial computation of anticipated losses and these are woven into prices and costs of service. Over the years, industries and their insurance carriers have carefully tabulated experience in particular fields of endeavor and ratings which fairly contemplate the hazards incident to various types of employment have been computed. The employer of white collar workers pays a certain premium per payroll dollar, whereas the employer of skyscraper window washers pays a far greater premium per payroll dollar. That is the kind

of system that was envisaged by the founders of Workmen's Compensation legislation and that is the kind of system that is contemplated by the Longshoremen's and Harbor Worker's Act. Stability which stems from the known and prescribed standards provides the degree of predictability which is required for the successful operation of the entire system. Each industry must bear the cost of its own industrial accidents. Its rate is consistent with that of others in the same field in the various states and the competitive advantage and equality is maintained. These considerations account for the fact that universally wages earned concurrently in dissimilar or unrelated employments are not permitted as a basis for compensation. As stated in Larson, Workmen's Compensation, Section 60.31, p. 80.

> "Of course, it can be argued that it is unfair to one employer, his carrier and his industry to burden them with a liability, out of proportion to his own payroll and premium computed thereon, arising from a risk not associated with his type of employment. This consideration has evidently prevented any statutory change in the rule requiring similarity in concurrent employments. Maine appears to be the only state in which earnings from concurrent dissimilar occupations can be cumulated for wage basis purposes; the only requirement there is that both must be jobs performed regularly during regular working hours."

Accord: *Brannigan* v. *Terzakis,* 285 App. Div. 980, 138 N. Y. S. 2 199 (1955); *Weiss* v. *Railway Express Agency,* 283 App. Div. 288, 127 N. Y. S. 2d 296 (1954); *Birch* v. *Budd,* 256 App. Div. 53, 8 N. Y. S. 2d 781 (1939); *Brandfon* v. *Beacon Theatre Corp.,* 300 N. Y. 111, 89 N. E. 2d 617 (1949); *Puschett* v. *Playland Park,* 268 App. Div. 946, 51 N. Y. S. 2d 419 (1944); *In the matter of Moochler* v. *Herrick & Son,* 247 App.

Div. 841, 286 N. Y. S. 397 (1936) aff'd 4 N. E. 2d 729 (1936); *DeAsis* v. *Fram Corp.*, 78 R. I. 249, 81 A2d 280 (1951); *Johnson* v. *Phaefflin*, 136 Conn. 107, 68 A2d 687 (1949); *Monterey County* v. *Rader*, 199 Cal. 221, 248 Pac. 912 (1926); *In re Howard*, 71 Ind. A. 557, 125 N. E. 215 (1919); *Western Metal Supply Co.* v. *Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916).

Presumably the policies and interpretations of the State of New York were accepted by Congress when adopting the statute which had its origin there. The opinions of that state are therefore of particular persuasion. *Iacone* v. *Cardillo*, 208 F.2d 696 (2d Cir. 1953). Admittedly many of the provisions of the New York Act are different. There is no difference however, between Section 14(1) of that Act, and Section 910(a) of the Longshoremen's and Harbor Workers' Act.

2. The terms, spirit and intention of the Act are violated.

The decision of the Court of Appeals does violence to the clear and unambiguous terms of the Act. Section 910(a) is applicable to employees who "shall have worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury . . . " as Mr. Hardy did. If applicable, section 910(a) fixes annual wage at a multiple of daily wages earned ". . . in such employment . . .". It precludes consideration of wages earned in concurrent dissimilar employments. Mr. Hardy's pre-injury average weekly wage properly computed is $84.40. The Deputy Commissioner used Section 910(c) and in reliance thereon included the $17.00 Giant Food weekly wages in his determination of average weekly wage which was $101.40.

Section 910(c) is applicable when neither Section 910(a) or 910(b) can ". . . reasonably and fairly be applied. . ." There was no attempt in this case to meet the evidentiary pre-requisite to the use of Section 910(c). The Deputy Commissioner is of the opinion that the choice of sections is a matter for his discretion and concludes that he is free to pick and choose whichever section results in a higher award to the claimant. There was no disguise of his procedure. He made no claim for the need of evidence with which to support his finding. The conflict is open and apparent. It presents the single question for decision. Is the act to be applied according to its prescribed standards or in accordance with the whim, caprice or social philosophy of the individual Deputy Commissioner?

The legislative history, selected excerpts of which are reproduced herein as Appendix B, could not speak clearer in its declaration that the subsections of Section 910 are to be exclusively applied. In each hearing and at each conference, it was stated and restated that subsection (c) was to be used when the nature of the employment is seasonal, casual, intermittent or discontinuous; that subsection (a) contemplates employment which is continuous and permanent in nature; and that subsection (b) applies when the employment is full time and permanent in nature, but for some reason has not been continuous for a full year.

According to the letter from Oscar Ewing, Administrator, to Hon. Fred Hartley, Jr., dated May 26, 1948 (App. B., p. 33). There was no significant changes proposed with reference to subsections (a) and (b) and only subsection (c), which he said ". . . applies to seasonal, intermittent, discontinuous and similar employment which affords less than a full work year or work

week", was to be amended to "... permit consideration not only of earnings in the particular employment in which the employee was engaged at the time of injury but also of his other earnings during the year preceeding the injury, regardless of whether it was in the same industry or not".

It is fundamental that the Deputy Commissioner may not supply the finding necessary for the invocation of subsection (c) by the simple expedient of making or declaring it. His statement must have foundation in the testimony introduced. *Universal Camera Co.* v. *N. L. R. B.,* 340 U. S. 474 (1951); *Lumber Mutual Casualty Ins. Co.* v. *O'Keeffe,* 217 F.2d 720 (2d Cir. 1954); *United Fruit* v. *Cardillo,* 104 F. Supp. 81 (S. D. N. Y. 1952). The sanction given by the Court of Appeals to the Deputy Commissioner's view that it is within his discretion to pick and choose that subsection which provides the larger award is in absolute derogation of the express terms of the Act, and contrary to its intentions. In effect, the Court of Appeals has written from the Act, subsections (a) and (b) because all of the considerations presented in those subsections are restated in subsection (c) together with criteria which permit consideration of earnings from unrelated employment. The application of Section 910(c) could not conceivably result in a lesser award than the application of Section 910(a) or (b). To illustrate this obvious fact, and the incongruity of the Court of Appeals decision, assume that two employees sustain identical injuries after working in the same employment for a period of two months. During the earlier part of the year the first employee earned $45.00 a week while the other employee earned $75.00 a week in unrelated employments. The average weekly wage

prevailing in the industry in which they were working at the time of the injury is $60.00 a week. A literal application of the act would require the use of subsection (b) because the employees had been working in permanent type employment for less than a year prior to injury. If subsection (b) were applied, each employee would receive disability benefits based upon an average weekly wage of $60.00 This would result in equality of treatment and consistency in the administration of the Act. However, the second employee would feel better if subsection (c) could be applied because the Deputy Commissioner could then fix his average weekly wage at $75.00 and base the award for disability benefits thereon. If the Deputy Commissioner applied subsection (c) in each case, he could award the first employee disability benefits based upon the average weekly wage in the employment in which he was working at the time of injury, or $60.00 and award disability benefits to the second employee based upon the average weekly wage of $75.00 earned in prior unrelated employment. Such discrimination was not within the intention of Congress. This court should not presume that Congress would have done the useless act of inserting subsections (a) and (b) into the Act without a purpose, and the Deputy Commissioner has no right to disregard those sections or to frame findings in language designed to avoid their rigors when the undisputed facts demand their application.

There is in fact no "disability" to compensate in this cause. Disability, a pre-requisite for any award, is defined at Section 902(10) to mean ". . . incapacity because of injury to earn the wages (i. e., '. . . the money rate at which the service rendered is recompensed under the contract of hiring in force at the time

of the injury. . .' Section 902(13)) which the employee was receiving at the time of injury in the same or any other employment. . . " (Parenthetical definition added). Mr. Hardy was not incapable of earning $84.40. He actually earns $94.60. By definition, there is no disability. To go beyond the Act and to manufacture a wage-earning disability by referring to concurrent wages earned in unrelated employment is to cut from the Act that stability and predictability which is required for its successful operation. How are employers or insurance carriers to protect themselves against claims for benefits based upon wages not earned in the industry which is responsible for the accident? The contract of insurance, for which premiums based upon the payroll dollar and that industries' risk rating, are paid, does not contemplate such exposure. Is the risk to be borne without compensation? Cost accounting is not competent to deal with such a situation and the theory of spreading the losses sustained in industry as a cost of the product of that industry will not function if one industry is required to bear burdens and risks not properly attributable to it. That is the reason for the unanimity of authority for the proposition that wages received in dissimilar employments may not be cumulated in determining average weekly wage. If, in Section 910(a) cases, such a rule were to be adopted, experience loss ratings would become meaningless and the predictability provided by this comprehensive statute which is required for the proper functioning of the compensation scheme would be destroyed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 18, 1956

APPENDIX

АРХИВ

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,911

LIBERTY MUTUAL INSURANCE COMPANY, a corporation, ET AL., *Appellants*

v.

THEODORE BRITTON, Deputy Commissioner, United States Employees' Compensation Commission, and WALTER W. HARDY, *Appellees*

Appeal from the United States District Court for the District of Columbia

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May 10, 1956

Mr. John P. Arness, with whom *Mr. Arthur J. Phelan* was on the brief, for appellants.

Mr. Ward E. Boote, Assistant Solicitor, United States Department of Labor, with whom *Messrs. Leo A. Rover,* United States Attorney at the time record was filed, *Lewis Carroll,* Assistant United States Attorney, and *Herbert P. Miller,* Attorney, United States Department of Labor, were on the brief, for appellee, Britton. *Mr. Rex K. Nelson* entered an appearance for appellee, Hardy.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This action was initiated in the United States District Court for the District of Columbia upon the filing of a complaint to review and set

aside as not in accordance with law a workmen's compensation order filed on January 25, 1955, by Theodore Britton, Deputy Commissioner. In said order, the Deputy Commissioner awarded compensation to Walter W. Hardy for permanent partial disability on account of an injury sustained by him while employed by Westinghouse Electric Corporation. Liberty Mutual Insurance Company is the carrier of workmen's compensation insurance for Westinghouse.

The essential facts are not in dispute. Hardy, while employed as an elevator construction mechanic's helper, fell some forty-five feet and sustained certain injuries. At the time of the accident Hardy had been working continuously for two years as a construction mechanic's helper for Westinghouse. This was an unskilled laboring position which involved the erection of new elevators and required heavy weight lifting and substantial physical exertion. His average weekly wage prior to the accident was $84.40. Over objection, the Deputy Commissioner permitted claimant to show also that for approximately two years prior to the accident Hardy was employed on a part-time basis for Giant Food Stores at an average weekly wage of $17.00.

The record shows that upon claimant's return to work he was compelled, because of his injuries, to accept work as a maintenance helper rather than as a construction helper. All construction and similar work requiring able-bodied physical effort is henceforth foreclosed to him. The only physician who testified asserted that claimant had 10% permanent partial disability as a functional impairment. He was unable, because of his injury, to continue his work for Giant Food Stores.

After returning to work Hardy received from Westinghouse higher dollar wages than before the injury, due to a general increase in the wage scale. Claimant was awarded compensation based on a 10% impaired capacity

to earn, the Deputy Commissioner taking into consideration "the previous earnings of the injured employee in the employment in which he was working at the time of the injury" (i.e., for Westinghouse) and "other employment of such employee" (i.e., for Giant Food Stores), as directed in § 10 (c) of the Longshoremen's and Harbor Workers' Compensation Act,[1] in determining the amount which "shall reasonably represent the annual earning capacity of the injured employee."

Appellants urge that the Deputy Commissioner erred in applying § 10 (c) of the Act since, due to the fact that the Westinghouse employment was full year-round employment, § 10 (a), 33 U.S.C. 910 (a), must be applied, thus eliminating the use of subsection (c) of § 10 in computing the rate of compensation. The applicable provisions of the section are set out as follows:

"§ 910. *Determination of pay.*

* * * *

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average

[1] 33 U.S.C. § 910 (c), as made applicable to the District of Columbia by the Act of May 17, 1928, as amended, D. C. Code 36-501.

daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee."

In their argument appellants point out that the pertinent federal statute is modeled after the Workmen's Compensation Law of the State of New York (L. 1928, c. 754, N.Y.); and that furthermore, in attempting to interpret the statute, the related cases[2] indicate that the earnings so determined "shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident." (§ 14 (3), N.Y. Compensation Act.) However, a complete study of the federal statute requires a different determination than that found under the New York law. To be noted is the fact that Congress included the words, "or other employment of such employee," in § 10 (c) of the Act. It is our opinion that general earn-

[2] *Puschett* v. *Playland Park*, 268 App. Div. 946, 51 N.Y.S. 2d, 419; *MacDowell* v. *Flatbush Congregational Church*, 13 N.E. 2d, 462, affirming 298 N.Y.S. 892; *Birch* v. *Budd*, 256 App. Div. 53, 8 N.Y.S. 2d 781; *Brandfon* v. *Beacon Theatre Corp.*, 300 N.Y. 111, 89 N.E. 2d 617.

ings are not restricted to "employments" or "types of employment" but rather extend to *individual* earnings.

Brief reference to the legislative history of the Act supports this position. At page 15 of the Report of the Committee on Education and Labor (H.R. Rep. No. 2095, 80th Cong., 2d Sess., June 1, 1948) we read:

> "Thus the present law is deficient in that if the employee had been employed in unrelated employment prior to his last employment, or in self-employment, such earnings could not be considered in ascertaining his true earning capacity. The proposed amendment to subdivision (c) would permit consideration not only of the earnings in the particular employment in which the employee was engaged at the time of injury but also of his other earnings during the year preceding the injury, regardless of whether it was in the same industry or not. . . ."

Also, in Senate Report No. 1315, 80th Cong., 2d Sess., May 17, 1948, Committee on Labor and Public Welfare, we find:

> "The measurement of an employee's capacity to earn should not be limited to his earnings in the particular employment in which he was engaged when injured, but should be gaged by what the employee is capable of earning in all employments in which he was employed during the year prior to injury, otherwise harsh results necessarily follow. The proposed change in subsection (c) seeks to avoid such harsh results by permitting consideration of earnings of the employee not only in the employment engaged in when injured, but all other employments in which he worked during the year prior to injury, and is intended to be inclusive of the reasonable value of the employee's services if self-employed during part of such year. The change proposed is consistent with similar change made in the New York workmen's compensation law some years ago, similarly to avoid harsh results, and it is also consistent with parallel provisions in other

State workmen's compensation acts." U.S. Code Congressional Service, 80th Cong., 2d Sess., 1948, Vol. 2, p. 1983.

Thus, while the New York statute tests the wage-earning capacity by looking solely to the "employment," we think that Congress intended to go beyond this and, as a norm, looked beyond employment to the individual earnings.

With respect to appellants' second contention, *i.e.*, absence of substantial basis in the evidence for a finding of impaired earning capacity, we find no error.

The judgment of the District Court is

Affirmed.

APPENDIX B

EXCERPTS OF HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON LABOR AND PUBLIC WELFARE, UNITED STATES SENATE, EIGHTIETH CONGRESS, SECOND SESSION, ON S. 2237 AND RELATED BILLS, APRIL 12, 13, AND 14, 1948

* * * * *

Statement of H. S. Webb, Representing the New York Shipping Association

* * * * *

At this time we would like to bring up the determination of pay section—Section 10—of the present act. I can either read that or skip it, but there are certain points in there that I would like to bring out. May I have a little more than 15 minutes?

Senator Ball. Yes; go ahead.

Mr. Webb. I would like to read it, because I think it is very important to the administration of the act. This is section 10:

(a) If the injured employee shall have worked in the employment in which he was working at the time

of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of 300 times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of 300 times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

The objection we have to this part of the act is in (a), (b), and (c).

The above section—that is (a), (b), and (c)—should, in our opinion, be amended. The law as it presently stands under section 10, paragraph (a), reads as follows:

If the injured employee shall have worked in the employment in which he was working at the time of the

> injury, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of 300 times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

These provisions were probably necessary in the past when the earnings of workers were not susceptible of ascertainment. At that time, there were 300 working days in the year. That situation, however, has changed.

The effective agreements negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of Greater New York and vicinity effective August 21, 1947 (wage rates effective October 1, 1947), provides a straight-time hourly rate of $1.75 for handling cargo on a 5-day-week basis. The straight-time yearly maximum number of days to be worked is 261, less 1 week's vacation and the 12 designated holidays, leaving 244 working days. This indicates that the present methods of computing an annual average wage under subdivisions (a) and (b) of section 10 of the law are inequitable. If, as implied in section 10 as now written, the men actually worked 300 days a year there could be no complaint. At the present time, a man is furnished with sufficient information by his employers to enable him to know and establish his annual earnings; those are the earnings which should be the standards under the law. The position of the association is that employees should receive compensation on the basis of two-thirds of their actual annual wage subject to appropriate maximum and minimum amounts. Obviously, men who are employed casually, if injured, should not receive greater compensation, therefore, during the periods of disability than they would receive while engaged in their casual work. It is appreciated, of course, that such a casual worker in the shipping industry might well be able to prove additional earnings in other industries in which they are normally employed which would provide a higher base for the

purpose of fixing compensation rates than purely the earnings of such workers in the shipping industry.

It probably would not be entirely fair to suggest that such compensation rate should be determined solely upon the basis of earnings of casual workers in the shipping industry but it would seem also to be equally unfair to suggest that the same maximum and minimum compensation rates should be afforded such men as those who are engaged steadily in the industry. The effect of affording the same maximum and minimum compensation payments to casual workers as are afforded to steady workers is, in our view, to penalize unduly the shipping industry. It is our suggestion, therefore, that paragraph (c) of section 10 be amended so as to provide for such workers the minimum rate of compensation but certainly in no event the maximum.

Senator Ball. I now have a copy of the New York law, and it provides that these healing periods as specified for these various injuries are included, unless in special cases they exceed the number of weeks specified as the healing period, in which case they are not included in that amount. That seems to be the effect of the law.

Mr. Webb. The way I interpret it is—take the case of loss of an arm—the State law says the man shall receive a proportion of 312 weeks for the loss of use of an arm. We assume 100 percent loss of the use of the arm would be 100 percent of 312 weeks.

There is also in the law what is known as protracted temporary total disability. That at the present time is 32 weeks. The law provides, according to my interpretation, that, "if the total protracted"—no, excuse me.

Senator Ball. I have the law right here. It says:

> If the temporary disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subsection (c) of this section.

Mr. Webb. That is correct, but the important point is the words "in excess."

Senator Ball. In other words, if for an arm the healing period is specified as 32 weeks but it actually took 40 weeks he would add 8 weeks to the total, making it 320.

Mr. Webb. That is right, but excuse me if I go a little bit further.

The New York State law was 312 weeks. The amendment to the Federal law went through in 1934. All that did was to take the 32 weeks from the 312 weeks, making it 280 weeks.

Senator Ball. In addition to the healing period, no matter how long it was.

Mr. Webb. That is right. If you work one case out against the other, if the disability goes beyond 32 weeks, the two laws are identical.

Senator Ball. That is right.

Mr. Webb. So you can say the laws are identical at the present time, or nearly identical, the present Federal law or the longshoremen's law, and the New York State law.

Senator Ball. Mr. Ryan of the longshoremen's union testified yesterday that in their agreement with the stevedoring firms they negotiated a flat rate of compensation, which I think he indicated as $22 a week, which seems to disregard all this testimony you have been giving about casual employment. Of course, under the act it is not disregarded.

Mr. Webb. The only reason we bring it up is we don't think the act is up-to-date, because it says in there that the worker's earnings should be taken into consideration. Under the act it is 300 times the average daily rate. The daily rate at the present time for longshoremen is $14 a day, and if you multiply that times 300 it is $4,200. Now, according to the act, as to pay and compensation, that means in effect that they are now in the industry.

Senator Ball. In other words, the basis is made in view of the fact that they are classed as longshoremen?

Mr. Webb. Yes. In 1927, when the law was enacted, there were 365 days in the year; there were 52 Sundays, which brings it down to 313 days a year, and there were 13 holidays. At that time there were 300 working days. At the present time there are 244—at least, that is the maximum.

Senator Ball. That is with the weekly vacation with pay.

Mr. Webb. That is right. That is 244 days.

Senator Ball. Extra pay for holidays too.

Mr. Webb. Well, any time that is not worked is not paid. You can work any time. You can work holidays.

Senator Ball. But I mean, do you pay for holidays?

Mr. Webb. Not unless they are worked.

In 1927 there was no way of establishing a man's earnings because the employer did not have too good records in those days, and the employee did not keep any record of what he earned. At the present time we have the withholding tax, which the employers have to pay. We have social security taxes, which the employers have to keep a record of. We have to furnish the employees with a record of their earnings. So it is easy to ascertain now the earnings of the employee.

* * * * *

(Mr. Webb submitted the following brief of the New York Shipping Association)

Memorandum Filed by New York Shipping Association, New York 4, N. Y.

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At this time, we would like to bring up the determination of pay, section 10 of the present act, which reads as follows:

"Sec. 10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

"(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

"(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

"(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury.

"(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

"(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability, the fact may be considered in arriving at his average weekly wages."

The above section should, in our opinion, be amended. The law as it presently stands under section 10, paragraph A, reads as follows: "If the injured employee shall have worked in the employment in which he was working at the time of the injury, during

substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of 300 times the average daily wage or salary which he shall have earned in such employment during the days when so employed." These provisions were probably necessary in the past when the earnings of workers were not susceptible of ascertainment. At that time, there were 300 working days in the year. That situation, however, has changed.

The effective agreements negotiated by the New York Shipping Association with the International Longshoremen's Association for the port of Greater New York and vicinity effective August 21, 1947 (wage rates effective October 1, 1947), provide a straight-time hourly rate of $1.75 for handling general cargo on a 5-day-week basis. The straight-time yearly maximum number of days to be worked is 261 less 1 week's vacation and the 12 designated holidays, leaving 244 working days. This indicates that the present methods of computing an annual average wage under subdivisions (a) and (b) of section 10 of the law are inequitable. If, as implied in section 10 as now written, the men actually worked 300 days a year, there could be no complaint. At the present time, a man is furnished with sufficient information by his employers to enable him to know and establish his annual earnings; those are the earnings which should be the standards under the law. The position of the association is that employees should receive compensation on the basis of two-thirds of their actual annual wage subject to appropriate maximum and minimum amounts. Obviously men who are employed casually, if injured, should not receive greater compensation, therefore, during the periods of disability than they would receive while engaged in their casual work. It is appreciated, of course, that such a casual worker in the shipping industry might well be able to prove additional earnings in other industries in which they are normally employed which would provide a higher base for the purpose of fixing compensation rates than purely the earnings of such workers in the shipping industry. It probably would not be entirely fair to suggest that such compensation rate should be determined solely upon the basis of earnings of casual

workers in the shipping industry, but it would seem also to be equally unfair to suggest that the same maximum and minimum compensation rates should be afforded such men as those who are engaged steadily in the industry. The effect of affording the same maximum and minimum compensation payments to casual workers as are afforded to steady workers is, in our view, to penalize unduly the shipping industry. It is our suggestion, therefore, that paragraph (c) of section 10 be amended so as to provide for such workers the minimum rate of compensation but certainly in no event the maximum.

* * * * *

Statement of Seth Levine, Research Consultant, CIO Maritime Committee

Senator Ball. What do you think about the point made by Mr. Webb about section 10?

It makes a lot of sense to me, since in this act, the basic wage is the daily wage multiplied by 300 days, which was figured on a 6-day, 48-hour week, I assume, whereas now they are working perhaps more, I would think, around 260 days a year. That would be a 5-day week for 52 weeks, not counting holidays. As I figure it, that adds a little over $10 a week to the individual's wage on which the benefits are figured which he actually does not earn and which he would not earn if he were not injured at all.

Mr. Levine. The problem is that even with the top limitation in the present act the maximum benefit under the bills now before the subcommittee still does not get to two-thirds, roughly two-thirds, of the real weekly earnings today. I do not think it does—I have not worked it out in details—and I think that it is a good sound social insurance principle. It predicates the benefit payment on a certain reasonable proportion of the wage loss. I can understand Mr. Webb's statement very well, but I think we have to work out against the real earnings how much of the wage loss is compensated, and I think the sub-

committee should certainly lay down the principle that a maximum of two-thirds of the wage loss should be made up by compensation.

Senator Ball. If you did that, there is no insurmountable obstacle, as I see it, to determining what the individual actually earns. Then divide that by 52 to get the base period.

Mr. Levine. Then take two-thirds of that.

Senator Ball. Then take two-thirds of that.

Mr. Levine. I would like to give it some more thought. On the basis of principal alone, it might come out above the $40 limit. I don't know whether it does or does not.

Senator Ball. It seems to me that the law as it now reads is a disproportionate benefit to the casual employee, who undergoes this risk maybe 1 percent of the working days in the year, as compared to the employee who works pretty steadily and undergoes the risk 100 percent of the time.

Mr. Levine. On that point, Senator, would you not think it would be much more important to give the degree of protection, perhaps even going out of our way to give an additional degree of protection to the casual worker who, after all, probably has smaller earnings during the year and probably is in a position where he is less able to take care of himself in event of emergency? I am not suggesting discrimination in favor of the casual employee, but I think most of the casual employees are not casual because they do not want to work, but because the labor force is perhaps larger than the need, and they are casual workers, just trying to get into that labor force.

Senator Ball. It is the social-insurance principle, it seems to me, rather than the workmen's compensation principle, which is supposed to be based upon earnings actually received, actual earning capacity, whereas the casual worker would not have that earning capacity, as I see it.

Mr. Levine. Except that I think you have to temper every workmen's compensation law with a certain degree

of social insurance, and you do, apparently, by putting in a minimum. That is the purpose of the minimum, even if the man does not earn the requisite amount to get the minimum benefits.

Senator Ball. I don't see where the minimum means very much, in view of this section 10, which says that if he works only 10 days at $14 a day, at stevedoring, but has worked the other 250 days of the year in some other occupation which paid him, maybe, $5 a day but if he works 10 days at stevedoring, then 250 days at some other job and becomes injured, then you figure his base for compensation not on earnings, what he would have earned if he worked 300 days at stevedoring?

Mr. Levine. I think it is a sound principle, Senator, not only because of the points I made before, but because—

Senator Ball. It may be sound in principle but it may be rough on those who have to pay it.

Mr. Levine. No; let me make this further statement—

Senator Ball. It is pretty rough on the industry, puts an unreasonable burden on the industry.

Mr. Levine. I will tell you why I think it is a sound principle. They based it originally on the concept of social insurance, which I think is important. The second consideration is, How do you distinguish between a nonworker and what they are calling a casual worker? The term "casual" would seem to imply somebody who of his own volition moves in and out of this industry; but if you set up the principle, you may have a worker who is injured on his first day of employment, and I say that that man is fully as entitled to reasonable compensation as a man who is injured after 20 years' service.

Senator Ball. I think you have a point there. You have to make some provision. I think the 300 days is probably excessive in view of the present workweek, and perhaps it should be on an alternative basis, what he actually earned.

Mr. Levine. I hate to commit myself without seeing the

way the figures work out, but I would say, since the principle is always reasonable compensation for the wages lost, if you have a dual standard it should not always necessarily work in the employee's favor. Actually, I do not know if figures are available, but I think in connection with the problem that Mr. Schell raised, about the top limit on cases other than death and other than total permanent disability, I do not think they will add very much at all to the employer's liability, or to his insurance payments, and I think what we are dealing with here is a very small amount of money, and against that you have to balance families which will be in great need.

Senator Ball. I know. What is the insurance rate now?

Mr. Webb. About 8.53 percent.

Senator Ball. $8.53 per hundred dollars of pay roll.

Mr. Webb. That is right.

Mr. Levine. The difference between a rate which had no limit for death or disability, and a $10,000 limit on other cases, against one which had no limit on any cases, would be very small. It is not the present rate, but it is the possible change.

Senator Ball. Have you figured out, or has any insurance actuary figured out, on the basis of past experience, what the rate might be under this?

Mr. Webb. One insurance company did some figuring on it. They claimed it was very hard to come up to the actual increase, but they figured it would be about 7 percent increase on the ship part of the cost, and they figured the rate will go up, roughly, from about 8½ percent, to around 13 percent, or more.

Senator Ball. From 8½ to around 13 percent?

Mr. Webb. Or more.

Senator Ball. Actually, after a couple of years' experience—the rates are based on experience.

Mr. Webb. That is correct.

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Senator Ball. I think we had better put into the record section 14 of the New York State workmen's compensation law, which deals with the basis of compensation. I will read it:

> Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:
>
> 1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of 300 times the average daily wage or salary for a 6-day worker, and 260 times the average daily wage or salary for a 5-day worker, which he shall have earned in such employment during the days when so employed;
>
> 2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a 6-day worker, shall consist of 300 times the average daily wage or salary, and if a 5-day worker, 260 times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;
>
> 3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual average earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment, or other employment as defined in this chapter, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working

at the time of the accident, provided, however, his average annual earnings shall consist of not less than 200 times the average daily wage or salary which he shall have earned in such employment during the days when so employed; further provided, however, that if the injured employee shall have been in the military or naval service of the United States, or of the State of New York within the 12 months prior to his injury, and his average annual earnings cannot fairly be determined under subdivisions 1 and 2, then the average annual earnings shall be determined by multiplying his average daily wage during the days so employed by not less than 240.

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;

5. If it be established that the injured employee was a minor when injured and that under normal conditions his wage would be expected to increase, that fact may be considered in arriving at his average weekly wage.

That seems to be substantially similar to this act, except that they do provide for the 5-day week, as I see it.

Mr. Webb. And, also, the 200-day provision.

Senator Ball. Yes. I do not know when that would apply.

Mr. Webb. Well, that would apply if there could not be pay roll proof shown as to similar occupation by the man himself. Then they would come down to the 200 days' level. That is why in New York they brought it up to 260. If a man could not show he worked 300 days, he would be paid on the basis of 200 times his daily pay. So we put the 5-day principle in, and if he worked 5 days a week, he could get 260 times the daily average pay.

Senator Ball. Is either Mr. Masson or Mr. Owens here?

Mr. Levine. Just one comment. I was figuring out some of this, and I noticed at the present rate of work in the industry, it does not make any difference whether you

make it 260 or 300 days. Almost all of them would be entitled to the maximum, and the only reason for putting in the 260 was, I think, for some wage-cutting period, but at the present time it would not make any difference.

Mr. Webb. It is in the New York law because of that coverage. It only applies to people getting the higher rates of pay.

Mr. Levine. Practically everybody is covered, and for all practical purposes it does not make any difference.

Senator Ball. Mr. Masson, or Mr. Owens, do you care to comment? Mr. Webb raised the question about section 10 defining the basis of compensation as 300 times the daily wage divided by 52. He pointed out that that was written into the law at the time when the workweek was 6 days. Now it is changed to 5 days, and there are several holidays in addition. It probably should be changed. I just read the New York law. I do not know whether we could work out a provision that would be reasonably similar to that or not. I would like to have your comments on it.

Mr. Masson. I understand the New York law is on the basis of a 40-hour week. I do not think there is much difference between the two, is there, between the New York law, and the 300 days?

Senator Ball. No. The New York law says that if he is working on the basis of 6 days a week, you compute his weekly earnings on a 300 day year, and divide that by 52. If he is working on the basis of 5 days a week, you compute it on 260 days, divided by 52. I do not know whether it makes any practical difference, or not.

Mr. Levine. No, hardly. It has been in the law now for 20 years, and I would not want to suggest any change. It has not worked any hardship on the employers as far as the benefits are concerned.

Senator Ball. Of course, this law was written in 1927, when you were on a 6-day week.

Mr. Levine. No. They have always had casual employ-

ment in the longshoremen industry. They might work 2 or 3 days this week, and 7 days the next week.

Senator Ball. But you worked 6 days then. Now, your contract specifically calls for a 5-day week.

Mr. Levine. They never had any schedule in the longshoremen's industry. They just worked when there was work for them.

Senator Ball. You are talking about individuals, but your workweek is 5 days, 40 hours, is it not, in your contract? Is not that what all this overtime row was about?

Mr. Levine. For overtime computations it is a 40-hour week, yes.

Senator Ball. It is a 5-day week.

Mr. Levine. Yes.

Senator Ball. It has changed in the last 20 years.

Mr. Levine. But their employment has not changed any. I mean, back in 1927 it was casual employment, the same as it is today.

Senator Ball. I realize that they are in and out. They may work 2 or 3 days one week, and 7 days the next, if there is an emergency.

Mr. Levine. In fact, I think their employment today is a lot different. They work more hours today than they did in 1927, and when they do work, in most instances they work maybe around the clock. Some weeks they might work 70, 80, 90 hours, and in other weeks, they may work only 40.

Senator Ball. Mr. Webb told us that only 25 percent of the longshoremen employed in New York City average over $50 a week, 75 percent less than that.

Mr. Levine. They try to share the work. They do not have—

Senator Ball. Is that substantially correct?

Mr. Levine. I would not know. I do not have any statistics on that. But if there is not enough work for the longshoremen, they try to share the work among them-

selves, and part of them would work maybe 3, 4 days this week, and others would work the rest of the week.

Senator Ball. It seems to me there is a rather important principle involved here. You ask us to put this at $40, on the basis that that will actually give them two-thirds of their average earnings. That would be two-thirds of $60 a week. But if their average earnings are less than that, how would you justify it?

Mr. Levine. I do not believe the maximum means too much. If they do not earn $50 a week, they do not receive the $40.

Senator Ball. They do. Under this formula in section 10, you compute the average weekly wage by taking the days he did work and what he earns. If he earned $14 a day, then you multiply that by 300, although, obviously, if the average is less than $50, they do not work any 300 days a year. Then you divide that by 52 to get the weekly wage on which you compute the compensation under this act. If the average earnings of longshoremen are less than $50, then it is pretty difficult to justify a $40 maximum and compute it on this kind of formula, which is not applicable any more.

Mr. Levine. I can see your point, but right now, and I think potentially in the future they are going to have full employment, and I think they average over $300 a year.

Senator Ball. You mean 300 days a year.

Mr. Levine. Three hundred days a year, I mean, if they are fit and able to work.

Senator Ball. Then how does your average get down below $50 a week, if they make $14 a day?

Mr. Levine. The accident frequency in the longshoremen's industry has been pretty high over, say, a period of the last couple of years, and a study has been made, I believe by the Bureau of Labor Standards, Department of Labor, and that might account for bringing the average down.

Senator Ball. I would not think the accident frequency

would affect that so much, not that much, certainly. For the whole industry, you only had something like 10,000 compensable injuries. The rest of them were very minor, where the men might have been out just to go to the doctor, or might have been out a day or two.

Mr. Levine. In that work, if you just strain your back, or something like that, you just cannot do the job.

Senator Ball. Well, that is a different story.

Mr. Levine. I would hate to suggest a change, or I would hate to see Congress make a change.

Senator Ball. You did not suggest it. The employers suggested it. There would seem to be some basis for it here. The whole principle of workmen's compensation, it would seem to me, is that when a man is injured, you provide him with two-thirds of his actual earning capacity. If his actual earning capacity is way below what this formula allocates to him, it seems to me there is a rather valid objection.

Mr. Levine. Are there not some State laws which are based on a 40-hour week?

Senator Ball. I just read the New York statute. If a man actually works 6 days a week, then they compute it on 300 days a year; if he actually works a 5-day week, they compute it on the basis of 260 days a year. I gather from your own statement that most of the longshoremen probably do not average more than 5 days a week.

Mr. Levine. If you base it on a 40-hour week, at $1.75 an hour, which is the rate today, it would average much higher than $60 a week—close to $70, would it not, which would put the $40 maximum in line, on a 40-hour week basis.

Senator Ball. After all, in 1927, the maximum of $25 was based on the average weekly wage actually earned in the industry, and actually paid, and that was a reasonable formula at that time. The contention here has been that we should adjust that formula in line with the average weekly wage today. If it is around $48, then it should be about $32, which is the New York maximum.

Mr. Levine. Well, is that $50 figure based on the present rate, or is that last year's figure?

Senator Ball. Mr. Webb, did you not give us that?

Mr. Levine. When they had a lesser rate.

Mr. Webb. That was from October 1, 1946, to September 30, 1947.

Mr. Levine. They had a lower rate at that time.

Mr. Webb. It was $1.65.

Senator Ball. One dollar and 65 cents. It is up somewhat now.

Mr. Webb. It is now $1.75.

Mr. Levine. Fifty dollars now would amount to maybe 4 or 5 dollars higher, which would bring it close to the $60, and that is a pretty good average, I think, in any industry. I do not know of any industry where one could work out an average, say, of $50 a week, even industries which have very much higher rates, even in the building construction industry.

Senator Ball. Thank you, Mr. Levine. I would like to ask Mr. McCauley to come in on this formula now.

Mr. Levine. Thank you, Senator.

Mr. William McCauley. I think you have correctly stated the statutory provision, Mr. Chairman, and the method of computing the average wage, namely, 300 times the average daily wage divided by 52, in order to arrive at the average weekly wage.

As a matter of practical application, that has not been followed in New York and in some of the other ports where agreements were made between the interested parties, namely, employers and employees, as to the wage rate to be used. In some other jurisdictions, it has not been followed, either—in some other compensation districts. The formula most generally followed is to use the actual earnings of the man during the year preceding his injury, providing he was employed substantially a full year.

You would usually get a statement of his earnings. And, of course, that has usually been accepted by the carriers and the employers in adjudicating claims. It has not

presented a serious problem up to the present time, because in most instances a regularly employed longshoreman would have earnings in excess of the present maximum of $37.50. As in most matters like that, it has not presented any serious problem, although the statutory formula has not been exactly followed.

Senator Ball. How about these casual employees who are employed on a seasonal basis, and who have a little truck farm, or something that they work on?

Mr. McCauley. I believe in certain types of operations they use the formula, taking the average daily earnings and multiplying by 300 to arrive at the weekly wage. If the man is regularly employed, or is in a gang regularly employed, although the injured person may not have been a member of that gang continuously, he would generally receive the same wage rate as the ones regularly employed. And, of course, during war years there has been substantially full-time employment for all these men. There has been plenty of work for everybody.

Senator Ball. What do you think of changing this formula to get it more in line with the New York statute?

Mr. McCauley. It would be rather difficult, I think, to present any substantial argument against that point. If a man is on a 5-day week, it seems reasonable to apply that work period to the calculation of his wages.

Senator Ball. It seems to me the way the present section 10 is written, everybody would be entitled to the maximum, although they might not have earned nearly that much.

Mr. McCauley. Of course, the third paragraph of section 10 provides for some administrative discretion in the determination of wages.

Senator Ball. Has the Board acted under (c) very much?

Mr. McCauley. Not often. In casual labor, strictly casual labor, that would be used, and I think perhaps it would be used more in the District of Columbia than it would in longshoremen operations.

* * * * *

Workmen's compensation statutes make the employer's liability certain. The risk of industrial accidents becomes a known and definite cost of doing business. The limitation provisions of the compensation statutes make the employer's liability a certain determinable operating cost, to the same extent that taxes, rent, wages and other expenses are a part of his operating costs.

* * * * * *

EXCERPTS FROM LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS, 80TH CONGRESS, 2d SESSION, SENATE REPORT NO. 1315

Mr. Ball, from the Committee on Labor and Public Welfare, submitted the following

Report

To accompany S. 2237

* * * * *

Sec. 4. Subdivisions (a), (b), and (c) of section 10 of the Longshoremen's and Harbor Workers' Act, as amended, are amended to read as follows:

"(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

"(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding

year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

"(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sums as shall reasonably represent the total annual earnings of such employee derived by him from the industry in which the employee was engaged and from any other industry or industries in which said employee may have been engaged during the year preceding such injury."

• • • • •

Section 4

Section 4 of the bill would amend section 10 (a), (b), and (c) of the present law, which specifies the method of determining the average weekly wage for the purpose of computing disability and death benefits.

The only proposed change in subsection (a) of section 10 of the act would be to include a factor by which to compute the wages of employees working full time in the employment in which they were engaged when injured. In 1927 many employees were employed on a 6-day week basis. The formula in the act was derived from an older formula in the New York Workmen's Compensation Act which was written at a time, several decades ago, when most employees worked on such 6-day week basis. As most employees now are employed on a 5-day week basis, the present statutory basis for computing wages is anachronistic, thus preventing use of the particular formula in most cases, as it can lawfully be applied only in those cases where employees work a 6-day week. The additional new factor (a 260 multiplier) is provided in the bill so that the particular provision can be made useful in the 5-day week employments.

The proposed change in subsection (b) of section 10 of the act carries out the same purpose as that in the change

proposed for subsection (a). Subsection (b) relates to employees whose occupation is full time, but through some circumstance the employee himself has not worked the full year (for example, he may have been ill during part of the year, or have been injured shortly after taking the employment). Under this subsection of the act, the wage of another employee in the same or similar employment is used as the measure of the injured employee's capacity to earn. The factors, however, must be consistent with those in subsection (a); hence the 260 multiplier must also be included in subsection (b) to accomplish this result.

Subsection (c) of section 10 of the act would be amended by section 4 of the bill so as to permit the inclusion of all earnings of the injured employee to be taken into account in determining the employee's annual earning capacity. This subsection in the present law is used where the employment itself, in which the injured employee was engaged when injured, does not afford a full year of work. It is also used where the workweek is shorter than 6 days (and would be used where such workweek is also shorter than 5 days under the proposed amendment to this section). Thus subsection (c) applies to seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek. Under the present law the employee's wage for computation purposes under subdivision (c) is limited to his actual earnings, and those of like employees, working in the same or most similar employment in which the injured employee was engaged. The finding must be as to the injured employee's earning capacity in the particular employment in which he was working when injured.

The measurement of an employee's capacity to earn should not be limited to his earnings in the particular employment in which he was engaged when injured, but should be gaged by what the employee is capable of earning in all employments in which he was employed during

the year prior to injury, otherwise harsh results necessarily follow. The proposed change in subsection (c) seeks to avoid such harsh results by permitting consideration of earnings of the employee not only in the employment engaged in when injured, but all other employments in which he worked during the year prior to injury, and is intended to be inclusive of the reasonable value of the employee's services if self-employed during part of such year. The change proposed is consistent with similar change made in the New York workmen's compensation law some years ago, similarly to avoid harsh results, and it is also consistent with parallel provisions in other State workmen's compensation acts.

EXCERPTS FROM LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS, 80TH CONGRESS, 2d SESSION, HOUSE OF REPRESSENTATIVES REPORT NO. 2095

Mr. Landis, from the Committee on Education and Labor, submitted the following

Report

[To accompany H. R. 6647]

* * * * *

(5) Page 6, strike out lines 17 to 24, both inclusive, and insert in lieu thereof the following:

"(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the

employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee."

* * * * *

EXPLANATION OF AMENDMENTS

* * * * *

Amendment (5): This amendment revises the wording of the bill, as introduced, to liberalize and clarify the standards to be applied under section 10 (c) of the act in determining the annual average earnings of an injured employee where the specific methods for determination are inapplicable.

* * * * *

PURPOSE AND SCOPE OF THE BILL

* * * * *

* * * The bill, as introduced, also revises the method of determining an injured employee's average annual earnings when such earnings cannot reasonably and fairly be determined under specific rules provided under the act. Such specific rules are also revised to reflect the prevalence of a shorter workweek, thereby increasing the number of cases to which such rules may be properly applied.

* * * * *

ANALYSIS OF BILL AS AMENDED

* * * * *

The amendment of section 1 proposed by the committee is designed to specify that the minimum compensation shall apply only in cases of total disability, whether measured at the $12 weekly figure or average weekly wages. Such change is desirable because of the absence of the qualifying word "total" in the present act and in the bill, as introduced, which omission has been construed by the Federal courts, e. g., *Clark* v. *Portland General Electric Co.* (111 F. (2d) 703 (C. C. A. 9th, 1940)), as requiring the payment of the full minimum dollar compensation in cases of partial

as well as total disability. This judicial construction has resulted in certain employees receiving compensation which, taken in connection with other remuneration, has exceeded their wages prior to injury. The proposed amendment has been favorably commented on in the Federal Security Agency Report hereinafter set forth.

• • • • •

Section 4: Section 4 of the bill, as introduced, proposes amendments to subsections (a), (b), and (c) of section 10 of the act. The amendments with respect to subsections (a) and (b) have the purpose of introducing a new multiplier for computing the average annual earnings of an injured employee, which earnings are in turn used for determining allowable compensation. Such new multiplier, which is stated as 260 times the average daily wage or salary, applies only to 5-day workers and is designed to recognize the prevalence at the present time of the 5-day week in the industries affected. Subsections (a) and (b) in the present act now provide a multiplier of 300 which is applicable solely to 6-day workers, with the result that it is necessary for computations with respect to 5-day workers to be handled under the alternative method provided in subsection (c). The addition of the new multiplier has been recommended by the Federal Security Agency to bring such computations under the specific rules. Your committee is of the opinion that these changes in subsections (a) and (b) are desirable to facilitate proper administration of the present act.

Subsection (c) in the bill, as introduced, which follows the wording of the bill (S. 2237) as passed by the Senate, has the effect of changing the alternative method of computing an injured employee's average annual earnings from a consideration of his earnings in the employment in which he was working at the time of the injury, taken in connection with the earnings of other similarly situated employees, to a consideration of the injured employee's

earnings not only in the employment in which he was engaged at the time of the injury but from any other employment as well. The emphasis is thus shifted in the earning capacity of an average longshoreman or harbor worker to the earning capacity of the particular employee from all sources, subject, of course, to the limitations of sections 6 (b) and 9 (e) of the act. Senate Report No. 1315, at pages 6 and 7, comments as follows with respect to the form of amendment of subsection (c) which appears in S. 2237, as passed by the Senate:

> Subsection (c) of section 10 of the act would be amended by section 4 of the bill so as to permit the inclusion of all earnings of the injured employee to be taken into account in determining the employee's annual earning capacity. This subsection in the present law is used where the employment itself, in which the injured employee was engaged when injured, does not afford a full year of work. It is also used where the workweek is shorter than 6 days (and would be used where such workweek is also shorter than 5 days under the proposed amendment to this section). Thus subsection (c) applies to seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek. Under the present law the employee's wage for computation purposes under subdivision (c) is limited to his actual earnings, and those of like employees, working in the same or most similar employment in which the injured employee was engaged. The finding must be as to the injured employee's earning capacity in the particular employment in which he was working when injured.
>
> The measurement of an employee's capacity to earn should not be limited to his earnings in the particular employment in which he was engaged when injured, but should be gaged by what the employee is capable of earning in all employments in which he was employed during the year prior to injury, otherwise harsh results necessarily follow. The proposed change in subsection (c) seeks to avoid such harsh results by permitting consideration of earnings of the employee not only in the employment engaged in when injured, but all other employments in which he worked

during the year prior to injury, and is intended to be inclusive of the reasonable value of the employee's services if self-employed during part of such year. The change proposed is consistent with similar change made in the New York workmen's compensation law some years ago, similarly to avoid harsh results, and it is also consistent with parallel provisions in other State workmen's compensation acts.

* * * * *

REPORT OF THE FEDERAL SECURITY AGENCY

The following is a report of the Federal Security Agency submitted to your committee in connection with its consideration of H. R. 6647:

FEDERAL SECURITY AGENCY,
Washington, May 26, 1948.

HON. FRED A. HARTLEY, JR.,
Chairman, Committee on Education and Labor,
House of Representatives, Washington 25, D. C.

DEAR MR. CHAIRMAN:

* * * * *

The change to "average wages" from "full weekly wages" in the proviso, as contemplated by the bill, is desirable since throughout the act "average weekly wages" as defined in section 10 of the act serve as the basis for computing compensation. It seems essential, however, to make the minimum disability compensation rate applicable only to total disability as in the original bill. The omission of the word "total" from the bill as amended is probably inadvertent. Its absence from the present law has produced in some cases the illogical result that the earnings of a partially disabled employee after injury, plus his minimum weekly compensation payable under this provision, exceeded the employee's wage, or average wage, at the time of injury (*Clark* v. *Portland General Electric Co.*, 111 F. (2d) 703).

* * * * *

4. Section 4 of the bill would amend section 10 (a), (b), and (c) of the Longshoremen's Act relating to

the computation of the average monthly wage. The proposed amendments to subdivisions (a) and (b) of section 10 would permit the computation of the average monthly wage to reflect the present widespread 5-day workweek where that is the workweek prevailing in the establishment in question. This part of section 4 requires no special comment. Subdivision (c), however, calls for some comment.

Under present law, subsection (c) is used where the employment in itself in which the injured employee was engaged when injured does not afford a full year of work. It is also used where the workweek is shorter than 6 days (and would be used where such workweek is shorter than 5 days under the proposed amendment to this section). Thus subsection (c) applies to seasonal, intermittent, discontinuous, and similar employment which affords less than a full workyear or workweek. Under the present law, the employee's average wage for computation purposes on subdivision (c) is determined by reference to his actual earnings and those of like employees working in the same or similar employment in which the injured employee was engaged, but the finding must be as to the injured employee's earning capacity in the particular employment in which he was working when injured.

Thus the present law is deficient in that if the employee had been employed in unrelated employment prior to his last employment, or in self-employment, such earnings could not be considered in ascertaining his true earning capacity. The proposed amendment to subdivision (c) would permit consideration not only of the earnings in the particular employment in which the employee was engaged at the time of injury but also of his other earnings during the year preceding the injury, regardless of whether it was in the same industry or not. The committee's report states that the amendment is also intended to determine the employee's wage-earning capacity by considering in addition the reasonable value of his earnings while self-employed, thus bringing into consideration in each case all of the factors tending to establish the true wage-earning capacity of the particular employee.

The bill, however, does not mention self-employment and there may be some doubt that a court would interpret such an amendment in accordance with the committee's intent. Moreover, too much has been excised by the bill from the present language of section 10 (c) of the act.

We think that the committee's intention could be fully effectuated and the above objections overcome by rephrasing subdivision (10) (c) to read as follows:

"(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum, as having regard to the previous earnings of the injured employee and of other employees of the same or most similar class working in the same or most similar employment or other employment in the same or neighboring locality, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee."

The foregoing is similar to the language of section 14, subdivision (3), of the New York law, which, however, provides further as follows: "*Provided, however,* his average annual earnings shall consist of not less than 200 times the average daily wage or salary which he shall have earned in such employment during the days when so employed: *Further provided, however,* That if the injured employee shall have been in the military or naval service of the United States or of the State of New York within twelve months prior to his injury, and his average annual earnings cannot be fairly determined under subdivisions (1) and (2), then the average annual earnings shall be determined by multiplying his average daily wage during the days so employed by not less than 240."

* * * * *

Sincerely yours,

OSCAR R. EWING, *Administrator.*

APPENDIX C

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. 901 et seq., as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D. C. Code 36-501, et seq.

The provisions involved herein are:

33 U.S.C.A. 902 (10)

"Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

33 U.S.C.A. 902 (13)

"Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C.A. 908 (c)(21)

"Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

33 U.S.C.A. 908 (h)

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such

wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

33 U.S.C.A. 910

Determination of Pay. Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class work-

ing in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

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CITATIONS

Cases:

Baltimore & Ohio Railroad Company v. *Clark*, 59 F. 2d 595 — 10

O'Hearne v. *Maryland Casualty Company*, 177 F. 2d 979 — 9, 10

Statutes:

Act of May 17, 1928, 45 Stat. 600, D. C. Code 36-501 — 12

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended by 62 Stat. 603, 33 U. S. C. 901, *et seq.*:

- Section 8 (c) (21) — 9, 12
- Section 8 (h) — 12
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- Section 10 (a) — 8, 9, 13
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- Section 10 (d) — 14

New York Workmen's Compensation Law (1928):

- c. 754 — 5
- Section 14 (c) — 5
- Section 14 (3) — 5

Miscellaneous:

H. Rep. No. 2095, 80th Cong., 2nd Sess., pp. 8, 15 — 6, 7

Larson, *Workmen's Compensation Law:* Section 60.31 — 8

S. Rep. No. 1315, 80th Cong., 2nd Sess., p. 6 — 7

405962—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 434

LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION, AND WESTINGHOUSE ELECTRIC CORPORATION, PETITIONERS

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND WALTER W. HARDY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT BRITTON, DEPUTY COMMISSIONER

OPINIONS BELOW

The District Court wrote no opinion. Its order granting defendant's motion for summary judgment (R. 9) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a–6a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1956 (R. 49). A petition for rehearing, timely filed, was denied on June 20, 1956 (R. 59).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Deputy Commissioner properly considered wages earned in regular, part-time, unrelated employment (in addition to the regular wages in the employment in which the injury occurred) in computing the pre-injury wage base of an injured workman for the purpose of determining the amount of a compensation award under the Longshoremen's and Harbor Workers' Act.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Act of March 4, 1927, 44 Stat. 1424, as amended by 62 Stat. 603, 33 U. S. C. 901, *et seq.*, made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D. C. Code 36–501, are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

This case arises upon a complaint to review and set aside, as not in accordance with law, an order by respondent Deputy Commissioner Britton awarding compensation to Walter W. Hardy for permanent partial disability on account of an injury sustained by him on July 21, 1952, while employed by Westinghouse Electric Corporation. The undisputed facts may be summarized as follows:

On July 21, 1952, Hardy, while employed as an elevator construction mechanic's helper, fell some forty-five feet and sustained certain injuries (R. 10–

11). At the time of the incident, he had been working continuously for two years as a construction mechanic's helper for Westinghouse (R. 16). This was an unskilled laboring position which involved the erection of new elevators and required heavy weight lifting and substantial physical exertion (R. 17). His average weekly wage prior to the accident was $84.40 (R. 15). Upon Hardy's return to work at Westinghouse he was compelled, because of his injuries, to accept work as a maintenance helper rather than as a construction helper (R. 17). All construction and similar work requiring able-bodied physical effort was henceforth barred to him (Pet. App. 2a). On his return to work Hardy received from Westinghouse higher dollar wages than before the injury, due to a general increase in the wage scale (R. 21).

Hardy filed a claim for workman's compensation with respondent Deputy Commissioner of the United States Employees' Compensation Commission, who found that, in addition to temporary total disability,[1] Hardy had suffered a 10% permanent partial disability (R. 5).[2] Finding that the disability prevented Hardy from working as an elevator construction helper as before and in addition prevented him from returning to his regular part-time job as a food checker and cashier for a retail grocery chain, where he had earned $17.00 a week, the Deputy Commis-

[1] The Deputy Commissioner awarded Hardy $940 for the temporary total disability. No issue is raised in regard to this award (R. 5).

[2] The only medical witness so testified before the Deputy Commissioner (R. 33).

sioner applied Section 10 (c), *infra,* pp. 13–14, rather than subsection (a), *infra,* p. 13, in ascertaining Hardy's average weekly wage prior to the injury to be $101.40 ($84.40 plus $17.00). The Deputy Commissioner then determined that Hardy's post-injury earning capacity was not fairly represented by his actual earnings as a maintenance helper,[3] and, accordingly, as authorized by the proviso in Section 8 (h), *infra,* pp. 12–13, the Deputy Commissioner fixed Hardy's post-injury earning capacity at $91.26 ($101.40 minus 10% thereof, *i. e.,* $10.14). Consequently, the Deputy Commissioner awarded Hardy weekly compensation of $6.76, representing ⅔ of the difference between his pre-injury and his post-injury earning capacity ($101.40 minus $91.26). Section 8 (c) (21), *infra,* p. 12.

Petitioners thereafter instituted this action to set the award aside, on the grounds, *inter alia,* that the Deputy Commissioner had erred in including Hardy's part-time wage from the grocery chain in determining his pre-injury earnings since Hardy had worked for Westinghouse during the entire year preceding the injury and the part-time wages were earned in dissimilar employment. Upon cross motions for summary judgment, the District Court denied petitioners'

[3] While Hardy's post-injury weekly wage as a maintenance worker was $94.60, the Deputy Commissioner found that this salary was a result of a general wage increase under a union contract and that the disability permitted him only "a limited area of opportunity for improvement in capacity to earn" (R. 5). According to the record, there is no opportunity in maintenance work to become a foreman, whereas such opportunities are present in construction work (R. 22).

motion and granted that of respondents (R. 7–9). The Court of Appeals affirmed (Pet. App. A, la–6a).

ARGUMENT

While petitioners seek to pose the question in different ways, their principal contentions all center about the Deputy Commissioner's inclusion of Hardy's part-time earnings in determining his pre-injury wages. The Deputy Commissioner's determination is, as both courts below ruled, correct and in accordance with the Congressional intent. There is no conflict of decisions and no need for review by this Court.

1. Prior to 1948, no earnings except those "in the employment in which the employee was working at the time of the injury" (Section 10 (c), 44 Stat. 1431) could be considered in fixing pre-injury wages; the emphasis was on the nature of the employment, not on the particular individual's earnings. The situation was the same in New York until an amendment of its Workmen's Compensation law in 1928, which added to its Section 14 (3) (a section which is substantially the equivalent of Section 10 (c), here involved), the phrase "or other employment as defined in this chapter". N. Y. L. 1928, c. 754. This amendment, however, did not change the objective of the determination, *i. e.*, a finding that the earnings so determined "shall reasonably represent the annual earning capacity of the injured employee *in the employment in which he was working at the time of the accident*" (emphasis added). N. Y. Compensation Law, Section 14 (3).

In amending Section 10 (c) of the Longshoremen's Act in 1948, Congress followed the New York change to the extent of borrowing the phrase "or other employment of such employee." But Congress did not stop there, as petitioners contend. Instead of limiting earnings in "other employment" to earnings in the particular *kind of employment* in which the employee was working at the time of the accident, Congress provided that the pre-injury wages should be determined on the basis of "the annual earning capacity of the injured employee." Section 10 (c), *infra*, pp. 13–14.

That Section 10 (c) was designed to include earnings in dissimilar employment is clear from the legislative history of the 1948 amendment. The Federal Security Agency, in recommending that Section 10 (c) be amended to its present form, stated (H. Rep. No. 2095, 80th Cong., 2d Sess., p. 15):

> Thus the present law is deficient in that if the employee had been employed in unrelated employment prior to his last employment, or in self-employment, such earnings could not be considered in ascertaining his true earning capacity. The proposed amendment to subdivision (c) would permit consideration not only of the earnings in the particular employment in which the employee was engaged at the time of injury but also of his other earnings during the year preceding the injury, regardless of whether it was in the same industry or not. * * *

And the House Committee adopted the proposal with the comment (*ibid.* at p. 8):

> Subsection (c) in the bill * * * has the effect of changing the alternative method of computing an injured employee's average annual earnings from a consideration of his earnings in the employment in which he was working at the time of the injury, taken in connection with the earnings of other similarly situated employees, to a consideration of the injured employee's earnings not only in the employment in which he was engaged at the time of the injury but from any other employment as well. * * *

The Senate Committee was of the same view (S. Rep. No. 1315, 80th Cong., 2d Sess., p. 6):

> The measurement of an employee's capacity to earn should not be limited to his earnings in the particular employment in which he was engaged when injured, but should be gaged by what the employee is capable of earning in all employments in which he was employed during the year prior to injury, otherwise harsh results necessarily follow. The proposed change in subsection (c) seeks to avoid such harsh results by permitting consideration of earnings of the employee not only in the employment engaged in when injured, but all other employments in which he worked during the year prior to injury, and is intended to be inclusive of the reasonable value of the employee's services if self-employed during part of such year. * * *

These explicit statements leave no doubt that Congress was fully aware of the situation of workmen, like Hardy, who earn their living in two or more different employments.[4]

This history goes a long way toward demonstrating the invalidity of petitioners' contention that, since Hardy had been working for Westinghouse during the entire year preceding his injury, the Deputy Commissioner was precluded from determining his pre-injury wages under Section 10 (c), and was required to use Section 10 (a), *infra,* p. 13. Petitioners' theory, that because Section 10 (a) could be applied subsection (c) could not be used, is predicated on the unsound assumption that subsection (a) has priority over subsection (c).

While subsection (a) normally is applicable where the employee had a year-round job, subsection (c) was intended to be invoked where neither of the other subsections would yield a fair or reasonable determina-

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[4] Petitioners' argument that inclusion of dissimilar employments in determining pre-injury earnings will upset the stability necessary to operate a workman's compensation system overlooks the fact that the rates paid by employers are based on past experience and are frequently revised. Moreover, the number of employees engaged in dual employment in unrelated industries is comparatively small, and the factor easily taken into account. As stated in Larson, *Workmen's Compensation Law*, Section 60.31:

"The objection, then, must be that one industry may ultimately be required to bear part of the burden of an injury produced by another. This may or may not be true in a particular case, but the harm done is so remote and theoretical that it hardly seems to offset the very real injustice of relegating a disabled man accustomed to full earnings to a benefit level below that of destitution because of the circumstance that he happened to earn his living in two 'dissimilar' jobs."

tion. And although the principal use of subsection (c) is in connection with seasonal or intermittent employment, there is nothing in the statutory language or legislative history which bars its use in cases of dual employment. See *supra,* pp. 5–8. On the contrary, subsection (c), on its face, expressly directs the Deputy Commissioner to apply that subsection when subsections (a) and (b) "cannot reasonably and fairly be applied" (*infra,* pp. 13–14). Subsection (a) cannot be fairly applied in the circumstances of the present case to determine, as provided by subsection (c), "the average annual earnings of the injured employee" which "shall reasonably represent [his] annual earning capacity," since the Deputy Commissioner could not properly find Hardy's pre-injury annual earning *capacity,* if his part-time wages as a grocery clerk were excluded. See *supra,* pp. 3–8.

2. Contrary to petitioner's assertion, the decision of the court below is not in conflict with *O'Hearne* v. *Maryland Casualty Co.,* 177 F. 2d 979 (C. A. 4). In *O'Hearne,* the claimant was injured after only two days on the job and the Deputy Commissioner computed the amount of compensation under Section 10 (b), *infra,* p. 13, taking the average daily wage of the two days worked as the basis for the computation of the average weekly wages for purposes of Section 8 (c) (21), *infra,* p. 21. In rejecting the contention that the Deputy Commissioner should have proceeded under Section 10 (c), since claimant's employment during the past year had been intermittent and discontinuous, the Fourth Circuit ruled that Section 10 (c) was applicable when the *type* of employment was

casual, intermittent, or discontinuous, not simply when the employment of the particular claimant was casual, intermittent, or discontinuous. However, in so ruling, the Fourth Circuit did not purport, nor was it necessary for it, to hold that such were the sole or exclusive conditions under which subsection (c) could be applied. Thus, *O'Hearne* did not deal with the issue here involved, *i. e.*, the propriety of applying Section 10 (c), as amended in 1948, in cases of dual regular employment.[5] Consequently, *O'Hearne* is not in conflict with the decision below.[6]

---

[5] *O'Hearne* has no bearing here for the further reason that the injury there occurred on December 9, 1947 (Appellant's Brief and Appendix, Docket No. 5960, United States Court of Appeals for the Fourth Circuit, 1949), a date prior to the 1948 amendment of Section 10 (c) which is controlling here. Apparently because the changes effected by the 1948 amendment did not bear on the issue before it, the Fourth Circuit inadvertently reproduced the amended statute, rather than the pre-1948 version, in the margin of its opinion, citing it as relating to a case decided in 1932 (*B. & O. R. Co.* v. *Clark*, 59 F. 2d 595 (C. A. 4)) to which the post-1948 version was clearly not applicable.

[6] A subsidiary argument advanced by petitioners, *i. e.*, that since Hardy's post-injury earnings as a maintenance worker exceeded his pre-injury earnings in construction he suffered no disability (Pet. pp. 16–17) can quickly be disposed of. Hardy's post-injury earnings were less than his pre-injury earnings (when the earnings from his part-time job are included). In addition, the Deputy Commissioner found that Hardy had suffered a 10% permanent partial disability and further that the transfer, necessitated by the injury, from construction to maintenance work deprived Hardy of opportunity for advancement. Finally, it is noteworthy that Hardy's higher wages as a maintenance worker resulted from a general wage increase pursuant to a union contract. Significantly, petitioners do not claim that Westinghouse paid maintenance workers higher wages than construction workers, either before or after the general wage increase.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MELVIN RICHTER,
Attorney.

OCTOBER, 1956

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended by 62 Stat. 603, 33 U. S. C. 901, *et seq.*, and as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D. C. Code 36–501, *et seq.* provides in pertinent part:

* * * * *

Section 8 (c) (21).

Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

* * * * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commission may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impair-

ment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * * *

Section 10.

Determination of Pay. Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compenstion and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the

injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

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JOHN T. FEY, C

IN THE

Supreme Court of the United States

October Term, 1956

No. 434

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Petitioners,

v.

THEODORE BRITTON, Deputy Commissioner, United States Employees' Compensation Commission, and WALTER W. HARDY

Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your respondent, Walter W. Hardy, prays denial of the petition for a writ of certiorari for the following reasons:

1. The decisions of the United States Court of Appeals for the District of Columbia and the Fourth Circuit are not in conflict.

Claimant Hardy worked full time employment with Westinghouse Electric Corporation for more than a year prior to injury, and during the same period also was steadily employed at Giant Food Stores. The evidence before the Deputy Commissioner showed that Hardy re-

turned to Westinghouse at light employment and at a wage in excess of that at time of injury, brought about by general wage increases through union contract, but that Hardy could not return to his employment with Giant Food Stores because of permanent residuals. The Deputy Commissioner stated:

> "That due to the permanent residuals of the injury, as found above, the claimant cannot return to work as a food checker and cashier for the retail grocery company which employed him prior to the injury and his wage-earning capacity has been thereby further reduced; . . . *that having regard to his wage-earning capacity at time of injury, the claimant's present wages do not fairly and reasonably represent his wage-earning capacity as diminished by the injury;* that having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and other factors which now affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally extend into the future, the claimant's wage-earning capacity is, in the interest of justice, fixed under section 8(h) of the Act at $91.26 per week, based upon a ten per cent impairment of the capacity to earn which the claimant had prior to the injury; that the said disability is permanent in quality; that for such permanent partial disability the claimant is entitled to compensation under section 8(c)(21) of the Act . . . ."

The problem thus posed in the Hardy case was not present in *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d 979. In the former two concurrent employments were involved, and in the latter case but one. A reading of the *O'Hearne* case shows that the Court did not rule that the subsections were to be exclusively and alternately applied, and the Court did not attempt to bind employments by description to any particular subsection as contended by petitioners. The Court did quote the law as written and referred to application of subsection (c)

where (a) and (b) could not *reasonably and fairly be applied*. The two cases are not in conflict and require no resolving.

Petitioners urge the persuasive value of New York State decisions, since Congress borrowed the pattern of that law, but admit many provisions are different and refuse to recognize the intent of Congress in departing from the New York pattern. The intent of Congress was that the deputy commissioner should consider all earnings of a claimant for the year prior to injury, as set forth in the House and Senate Reports quoted in the Court of Appeals decision (p. 5a).

2. The Deputy Commissioner's Compensation Order is in full accord with the Act.

Petitioners seek imposition of a limitation on the Act obviously never intended by Congress, and attempt support of their position in argument of only that portion of the Senate report which refers to seasonal, casual, intermittent or discontinuous work. Such referral is illustrative, not restrictive, for a complete reading of the Report demonstrates several applications beyond the seasonal category in the former law. The purpose of the new law was to permit inclusion of all earnings to determine the employee's annual earning capacity where application of the other formulas was not fair or reasonable. The Senate report notes that under the old law the finding of earning capacity was bound to his employment when injured, and the purpose of Subsection (c) was to avoid "harsh results" arising by reason of such limitation.

Obviously Congress could not anticipate and provide for every eventuality by specific categories, and the alternative is provided when Subsections (a) and (b) "cannot reasonably and fairly be applied." The sole measure of compensability is not dollars earned at time of injury

and the wage paid upon return to work. The Deputy Commissioner in his order awarding compensation recited evidence that Walter W. Hardy had limitation of motion of his spine, suffered pain on heavy exertion and in certain body positions; that he could not stand erect for more than an hour or two; that these residuals were permanent; that he was placed in lighter work, maintenance, upon resumption of duty, which limited his opportunity for improvement in capacity to earn. The latter finding was based upon evidence that certain advanced positions in the construction field had no counterpart in the maintenance department, and that opportunity for advancement was better where the employee was qualified in both construction and maintenance. Hardy testified he could not resume construction work because of heavy lifts required, or his employment with Giant Food Stores because of a requirement of long and steady standing. Medical testimony in the record showed a permanent partial disability rating of 10 percent based upon limitation of forward bending in the back, lack of strength in the abdominal muscles, and Hardy's complaints as they affected his ability to perform his work. The record demonstrates ample compensable "disability". Petitioners' allegation (p. 15) that the Court of Appeals in sustaining the Deputy Commissioner wrote, in effect, subsections (a) and (b) from the Act are without substance. These subsections undoubtedly cover the majority of the situations that arise, and (c) applies only where the other formulas cannot "reasonably and fairly be applied." The evidence was ample to support the Deputy Commissioner's finding that neither (a) or (b) was applicable under the facts of the case, and that interest of justice required a finding under (c).

The reasoning of error by petitioners is confusing, but apparently resolves itself by the following on page 6 of the petition herein:

> "The clear and unambiguous terms of the Act, its legislative history and the applicable authorities *restrict the use of Section 910(c) to cases where the nature of the employment is seasonal, intermittent or discontinuous.*"

Thus it appears petitioners claim error because the employment in question was not seasonal, intermittent or discontinuous, and raise no question whether the Deputy Commissioner erred because of his particular findings that (a) and (b) could not be reasonably and fairly applied. Petitioners accordingly have presented no reason for issuance of a writ of certiorari. If the law impose a hardship on insurance carriers, real or imaginary, their quarrel is with Congress. The Deputy Commissioner administers the law.

CONCLUSION

For the foregoing reasons respondent Walter W. Hardy believes the writ of certiorari should not be granted.

Respectfully submitted,

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October 29, 1956